No. 93-880

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In The

Supreme Court of the United States

October Term, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,

Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,

Respondents.

On A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF CHRISTIAN LEGAL SOCIETY, AMERICANS UNITED FOR LIFE, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, AND NATIONAL ASSOCIATION OF EVANGELICALS, *AMICI CURIAE*, IN SUPPORT OF THE PETITIONERS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the state court injunction against the speech and expressive activity of abortion protestors was so vague in some parts as to permit discriminatory, viewpoint-based enforcement of the injunction in violation of the First Amendment.

Whether the state court injunction against the speech and expressive activity of abortion protestors, even when clear in its terms, was so overbroad as to chill speech protected under the First Amendment.

Whether the state court injunction exceeded the remedial powers of a court.

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STATEMENT OF INTEREST

Amici are civil rights and religious organizations dedicated to the advocacy of strong protection for freedom of speech, and for the first of our civil liberties, religious freedom. Although the underlying contentions about abortion are controversial, we file this brief simply to abide by a golden rule of civil discourse that would secure for others the rights we wish guarded for ourselves.

Among the civil rights that religious organizations wish to exercise is the ability to influence public debate about matters of public concern, free from excessive regulation or control by the government. This is especially true of *judicial* regulation, such as the injunction at issue in this case, for *Amici* frequently have recourse to the courts to protect their fundamental rights.

When the state courts fail to conform to the minimal guarantees secured in the federal constitution, *Amici* find it proper to "take alarm at this first experiment on our liberty." James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 3 (1785), *cited* in *Everson v. Board of Education*, 330 U.S. 1, 65 (1947) (Rutledge, J., dissenting).

Irrespective of our views about abortion and the conduct of some advocates on both sides of this burning controversy, we are all committed to the principle of equality of all speakers before the law, and we view with particular alarm the diminution of care about First Amendment values that we see reflected in the decisions below.

Amici do not view their liberty in religious matters to be merely a sub-category of free speech or a constitutional redundancy, but to be an inalienable right that is distinct and foundational for all of the other civil liberties secured in the First Amendment. In the words of a bicentennial document celebrating religious liberty, "It [religious liberty] is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. This basic civil liberty is clearly acknowledged in the Declaration of Independence and is ineradicable from the long tradition of rights and liberties from which the Revolution sprang." *Williamsburg Charter*, 8 *J. L. & Relig.* 5 (1990).

The particular statements of interests are attached in Appendix A. This brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

The principal difficulty that *Amici* perceive with the intent and effect of the injunction below is that it undermines the First Amendment's commitment to equality of all speakers in the public square. This Court has held this guarantee to be true not only of secular speakers, but has, in effect, guaranteed that religiously motivated speakers of both sides of controversial matters will have the same opportunity for expressing their views as secular speakers. *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993); *Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). It is, moreover,

fundamental to the understanding of the Establishment Clause that all religious groups are equal under the law. *Larson v. Valente*, 456 U.S. 228 (1982); *see also* Michael Paulsen, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 *Notre Dame L. Rev.* 311 (1986).

This equality of all speakers on controversial matters was compromised by the issuance of the injunction below, which appears to the *Amici* to be aimed at one side in the abortion debate. Even if it had not been intentionally aimed at one viewpoint, the effect of the injunction was not neutral as to viewpoint. Speakers on one side of the controversy were arrested while speakers on the other side were not, despite the fact that the latter, too, were making noise outside the clinic, as prohibited on the face of the injunction.

Amici offer three legal rationales for reaching the conclusion that the injunction at issue here is constitutionally infirm. First, the inherent vagueness of portions of the injunction allowed discriminatory, viewpoint-based enforcement. Second, even where the injunction was crystal clear, it is fatally overbroad, not narrowly tailored. Third, the standards governing the equitable power of courts announced by this Court require the reversal of the decision below because the remedial power of a state court to enjoin speech or expressive activity, which in our view should not be greater than that of the federal courts, was exceeded here.

ARGUMENT

I. The vagueness and overbreadth of the state court injunction aimed at one side in the abortion controversy is contrary to the national commitment to "uninhibited, robust, and wide-open" debate on matters of public concern

Amici note at the outset the national commitment to "uninhibited, robust, and wide-open" debate on matters of public concern. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This Court, moreover, has frequently recognized the right of religious organizations to engage in vigorous advocacy on matters of public policy. For example, in *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the Court acknowledged: "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Id.* at 670. And in *McDaniel v. Paty*, 435 U.S. 618 (1978), Justice Brennan noted:

> That public debate of religious ideas, like any others, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. . . . [R]eligious discussion, association, or political participation [is not] in a status less preferred than rights of discussion, association, or political participation generally. . . . The State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association. . . .

Id. at 641 (Brennan, J., concurring).

Many of the *Amici* have themselves engaged in various forms of advocacy, whether through the filing of amicus briefs in this Court as in this instance, or through a wide variety of speech and expressive activity that they deem consonant with the teachings of our religious communities.[1] As the Williamsburg Charter puts it, "Many of the most dynamic social movements in American history, including that of civil rights, were legitimately inspired and shaped by religious motivation." *The Williamsburg Charter, 8 J. L. & Relig.* 5, 20 (1990); *see also* Dean Kelley, The Intermeddling Manifesto, or the Role of Religious Bodies in Affecting Public Policy in the United States, 8 *J.L. & Relig.* 85 (1990) (discussing several historical instances of religiously motivated participation in American politics); *and see* Samuel Rabinove, How – and Why – American Jews Have Contended for Religious Freedom: The Requirements and Limits of Civility, 8 *J. L. & Relig.* 131 (1990).

In recent times America has frequently contrasted itself favorably to totalitarian regimes of the Left and the Right that swallowed up their opposition, sending them to the death camps and the Gulags for extermination. We

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[1] The fact that the life issues presented in the abortion debate may be influenced by religious convictions does not, of course, mean that abortion is a taboo subject for public debate on the ground that it is primarily a religious concern. On the contrary, the most difficult issues in this conflict frequently involve differences in perspectives about biological determinations, and the allocation of public resources for health care, all of which are manifestly appropriate for open, public debate. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 760 (1993); *Planned Parenthood of Southeast Pennsylvania v. Casey*, 112 S.Ct. 2791, 2806 (1992); *Harris v. McRae*, 448 U.S. 297 (1980).

take some pride in the way we have tolerated the strong voice of protest within our legal and political culture. Perhaps we have taken too much pride in our treatment of dissidents in view of the harsh penalties that were frequently applied to them. Whatever the right blend of pride and humility about our past, it is undeniable that our dissidents have at many critical turning points of American history helped to shape our destiny. But it has been alot easier to recognize the value of radical protest decades afterwards, when the position the protesters espoused was more broadly received by the people and incorporated into our laws.

A classic illustration of this point is the eradication of the slavery system, which nearly everyone in America would now regard as the just and rightful repudiation of a brutal and inhuman labor system. Some might claim that slavery might have been abolished earlier and with less bloodshed on the battlefields of the Civil War if the Abolitionists had been more "accommodating" to their adversaries, but this revisionist view overlooks the hard mindset of the slaveholders who would brook no compromise on the matter of slavery as an inalienable property right. For example, some of the congressional supporters of slavery got to the point where they literally did not want to hear about arguments against slavery. In 1836 they imposed what is known as the "Pinckney gag," which prohibited any discussion of the slavery issue in the House of Representatives. Congressman John Quincy Adams (then in his seventies) strenuously opposed the gag as a violation of the people's right to petition the government, which he deemed co-extensive with the freedom of speech. These efforts earned Adams the

nickname, "Old Man Eloquent," but the gag lasted until 1844. As antebellum America became increasingly censorious, not tolerating open debate about the raging controversy of slavery, it became more and more inevitable that the issue would be resolved by "the blood of brave men on both sides which was shed on the terrible battlefields of Shiloh and Gettysburg and Cold Harbor," *Carey v. Population Services International*, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting). The stifling of dissent led over 600,000 young men to their graves.

Whatever the possible outcome of alternative hypothetical scenarios on the slavery issue, the fact remains that the Abolitionists were indeed radical in their day. The most famous of the Abolitionists, William Lloyd Garrison, was uncompromising in his campaign for immediate and complete abolition of slavery. In the first issue of *The Liberator* (Jan. 1, 1831) Garrison publicly renounced his previous position of gradual abolition and asked "pardon of my God, of my country, and of my brethren, the poor slaves, for having uttered a [gradualist] sentiment so full of timidity, injustice and absurdity." And he wrote: "urge me not to use moderation in a cause like the present! I am in earnest. I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." As cited in *The Abolitionists: A Collection of Their Writings* 31 (Louis Ruchames ed. 1963) (emphasis in original).

It can plausibly be maintained that less famous Abolitionists were more effective in moving the hearts of

their countrymen, but Garrison and the radical Abolitionists were ultimately heard indeed. As Garrison put it in the opening issue of *The Liberator*, "POSTERITY WILL BEAR TESTIMONY THAT I WAS RIGHT." As cited in *The Abolitionists: A Collection of Their Writings* 31 (Louis Ruchames ed. 1963) (emphasis in original). Although not all of the acts of the Abolitionists would gain support even today, the basic thrust of their movement has now clearly prevailed in American law. Decades after the failure of the problematic period of "Reconstruction," we are now more committed than ever to the enforcement of the Civil War Amendments that would have been inconceivable without the firm resolve of the "Radical Republicans" and their moral progenitors, the Abolitionists.

Not to be overlooked in the story of abolition of slavery is the significant role of religious groups like the Quakers in the forefront of the operation of the underground railroad, the Methodists at Lane Seminary in Ohio who forced the slavery issue to the top of the academic agenda throughout the Midwest, and the Congregationalist preachers in New England who gave spirited, rousing sermons to stir up an impassioned response to the slavery system. For example, citing the prophet Isaiah (28:18), the Abolitionists in Boston used to denounce the United States Constitution as "a covenant with death, a compact with hell," and they burned this document as part of the liturgy of their annual meeting to symbolize their repugnance at its flawed compromise over slavery.[2]

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[2] See Edward McGlynn Gaffney, Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality, 64 *Tulane L. Rev.* 1143 (1990).

To be fair to the complexity of the past, the slavery issue divided religious communities in this country in the nineteenth century,[3] much in the way that abortion does today. This fact, however, cuts in favor of governmental neutrality with respect to various speakers on burning issues, and does not justify the one-sided approach manifested in the injunction here.

A. The state court injunction against the speech and expressive activity of abortion protestors was so vague in some parts as to permit discriminatory, viewpoint-based enforcement of the injunction in violation of the First Amendment

Many of the terms of the injunction are crystal clear. For example, even an empiricist from the University of Chicago should be content with the precision of the designation of a 36 foot buffer zone, or a similar line drawn 300 feet from the entrance of the abortion clinic where the events at issue here took place.

There are, however, some provisions in the injunction that cause serious difficulties of interpretation both for those against whom they were aimed and for those with enforcement responsibilities. For example, the injunction forbids "sounds or images observable to or within earshot of the patients inside the Clinic." Pet. App. B-8. Noise levels may be easy to measure with a decibel meter, but how is one who is standing on a picket line and

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[3] See Anson Phelps Stokes, 2 *Church and States in the United States* 156-203 (1950).

speaking at a normal volume to know whether her voice is audible inside the clinic? Again, one could obviously expect that a blimp blocking out the very rays of the sun would have an observable effect inside the clinic, but can this standard make much sense in the normal course of business on American picket lines? All one has to do to answer this question is to change one fact in this case. Make it a union picket line, or make it a group of angry consumers protesting a product known to be carcinogenic, or make it a group of animal rights advocates upset with the sale of furs, and the result seems plain. This standard could not pass muster, in part because it vests too much discretion in the peace officers charged with carrying out the injunction.

Another instance of an impermissibly vague provision in the injunction is the command to refrain "from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [demonstrators]." Pet. App. B-8. The word "approaching" is used twice, with apparently inconsistent meanings. To be on the safe side of being arrested, a sidewalk counselor[4] must understand it to mean that she may not

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[4] In *Planned Parenthood v. Casey, supra,* this Court sustained the portion of the Pennsylvania statute that mandated the provision of information that would enable the consent of a woman seeking an abortion to be fully informed. 18 Pa. Cons. Stat. Ann. § 3205. It did so on the view that "[i]n attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey,* 112 S.Ct. 2791, at 2823 (Opinion of O'Connor, J., Kennedy, J., and Souter, J.). The State of Florida, however, does not require that women seeking an abortion receive the sort of information about this procedure that the Commonwealth of Pennsylvania requires. In fact, if the Florida legislature had enacted such a statute, doubt has been cast on its validity under the state constitution. *In re T.W.,* 551 So. 2d 1186 (Fla. 1989). Thus the sidewalk counselors enjoined in this case were attempting as private actors to provide the information and alternative perspectives that were supplied by the State in *Casey.*

physically approach even in the sense of moving in the direction of a person seeking the services of the abortion clinic unless that client has "approached" her in the sense of coming very close to her. Or would a step forward do? If the step is misread, then the false step can land the protester in jail. And even if a clinic patient comes into close physical proximity with the sidewalk counselor, how is the counselor to know whether this "approach" really implicates a "desire to communicate"? Would a nod serve to indicate that she is willing to hear her message? Would we tolerate such a standard for striking union members, boycotting consumers, or animal rights advocates?

A third instance of vagueness is found in the same paragraph of the injunction, which also instructs the demonstrators "not to accompany . . . , encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." Pet. App. B-9. As college administrators have discovered to their chagrin, there is a problem with speech codes. What, for example, does one do with the

epithet, "You water buffalo"? Is that harassing, threatening, or verbally abusive? The line is not clear in many of these new campus guidelines for proper speech. *See, e.g.*, Nat Henthoff, *Free Speech for Me – But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (1992). Neither is it here. Normally one will know what it means to refrain from physical abuse, but many of the verbs in this paragraph of the injunction fall far short of the requisite clarity. The problem of determining whether a woman entering a clinic "choose[s] not to communicate" with a demonstrator is similar to that noted above about knowing when such a woman "indicates a desire to communicate." Again, these terms give too much discretion to the arresting officer and too little information to the demonstrator to know how to avoid an arrest.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972) this Court has summarized the three basic values that are upheld by a standard that requires clarity in criminal statutes:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Id. at 108-109 (footnotes omitted); *see also Papachristou v. City of Jacksonville* 405 U.S. 156 (1972); *and see Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Here all three values inherent in the vagueness doctrine are in play. The demonstrators did not have sufficient notice to avoid arrest if they chose to do so. The arresting officers were not given narrowly tailored instructions to inform and guide their discretion; indeed, they were practically told to arrest petitioners for the same conduct which pro-choice demonstrators were engaged in at the same time and place.[5] And the conduct for which the demonstrators were arrested was expressive activity that would normally be deemed protected if

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[5] Demonstrations at the facility drew both anti-abortion and pro-clinic supporters, often resulting in heated exchanges between individuals from both groups. Pet. App. B-2, B-3. During the demonstrations, Operation Rescue "and those aligned with them, remained primarily in the public right of way (paved and unpaved). The pro-choice demonstrators would be on the edge of the clinic's lawn and parking lot (private property) but occasionally attempt[ed] to share the sidewalk with the opposition." Pet. App. B-3 ¶ D. The Florida Circuit Court [trial court], however, did not find the threat of noise sufficiently compelling to include both pro-life and pro-choice demonstrators within the restrictions of the injunction, although both groups created the "noise" enjoined by the court. Pet. App. B-2, B-3 ¶ C.

it were engaged in by those espousing causes other than the pro-life side of the abortion debate.

The vice of discrimination as an aspect of vagueness becomes more apparent on this record when attention is focused on the hearing conducted on April 12, 1993, by the Hon. Robert McGregor, the trial judge who issued the injunction. Under the terms of the amended permanent injunction, individuals arrested for acting "in concert" with the named parties were brought before Judge McGregor for a hearing. Pet. App. B-9. Excerpts from this hearing illustrate the very real problems created by the vagueness of the definition of what constitutes acting "in concert." Judge McGreger himself had difficulty explaining the scope of the term "in concert" to the people arrested under the injunction he had written. The significance of the fact that even the judge issuing the order did not comprehend the precise meaning of the terms of the injunction illustrates the difficulty of regarding its restrictions as narrowly tailored.[6]

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[6] Included among the company of the confused was the City of Melbourne, Florida, where these events took place. After having arrested over 100 persons on the strength of this injunction, the City filed a motion to intervene in these proceedings, pleading with the Circuit Court for "guidance" as to the meaning of the term "in concert" in the injunction. *See* Motion to Intervene and to Clarify Amended Permanent Injunction, ¶¶ 4, 8. It was a little late to ask for clarification as to whether a person acting "in concert" could be known when seen. *See also* the following colloquy between one of the arrestees and Judge McGregor:

> JOHN DOE NO. 31: What kind of [in concert] activities would those be? I mean how could they just by looking at me determine that I was acting in concert? I want to know what I –
>
> THE COURT: You were there. I wasn't. I can't give you any more than what I've given you. You know what you were doing.

Excerpts from the April 12, 1993 appearance hearing held before Circuit Judge McGregor, page 149 line 1 through page 149 line 7.

For example, the following colloquy took place between the judge and one of the demonstrators:

> JOHN DOE NO. 16: I understand from the conversation that's taken place so far that I'm being arrested because I was perceived to have been acting in concert with those who were praying or violating any of the other injunctions in the Court Order. Is that true?
> THE COURT: Yes, sir.
> JOHN DOE NO. 16: On what basis was that determination made?
> THE COURT: *Whatever activities you were engaged in seemed to be supportive of pro-life. . . .*
> JOHN DOE NO. 16: My understanding is that there were other demonstrators in the restricted area that were not acting in concert with us. And I wanted to know how that determination was made?
> THE COURT: Whatever the police officer perceived by looking.
> JOHN DOE NO. 16: Were the beliefs in ideology of those people, did that have anything to do with the determination in the Injunctive Order or in the arrest?
> THE COURT: You know, I wasn't there. I don't know. All I know is that the officer used his perceptions, his eyes, his ears, took note of the activities that were going on and for reasons, you know, he believed that you were in concert with those that had been enjoined and the

> Injunctive Order is expanded to include those so that you were subject then to the injunction. . . .
> JOHN DOE NO. 16: *When you issued the injunction did you determine that it would only apply to – that it would apply only to people that were demonstrating that were pro-life?*
> THE COURT: *In effect, Yes.*

Excerpts from the April 12, 1993 appearance hearings held before Circuit Judge McGregor, p. 112 line 25 through p. 113 line 10 (J.A. 72); p. 114 line 17 through p. 115 line 10 (J.A. 73); p. 116 line 14 through p. 116 line 18 (J.A. 74) (emphasis supplied).

B. The state court injunction against the speech and expressive activity of abortion protestors, even when clear in its terms, was so overbroad as to chill speech and expressive activity protected under the First Amendment.

With the exception of the provisions discussed above, most of the terms in the injunction are sufficiently clear to avoid being found void for vagueness. But, as this Court also taught in *Grayned*, "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. . . . The crucial question, then, is whether the [ban] sweeps within its prohibitions what may not be punished under the First . . . Amendment." *Grayned*, 408 U.S. at 114-115.

The vice of a truly overbroad statute is that it conjoins in a single ban both conduct that may legitimately be proscribed and conduct that may not. The same must

be said of a judicial order such as the injunction here.[7] It has a ripple effect far beyond the parties, sending a chill into the air that would make a person think twice before engaging in protected activity. For this reason, this Court has repeatedly clarified that "In the First Amendment context, litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. American Booksellers Assoc., Inc.*, 484 U.S. 383, 392-93 (1988) (internal quotations omitted); *see also Secretary of State of*

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[7] In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court changed the standard for determining whether a *statute* or *ordinance* should be invalidated on overbreadth grounds. Recognizing that this result – invalidating a statute or an ordinance – is potent medicine, the Court required a showing of "substantial overbreadth," i.e., evidence that in a substantial number of instances a statute or ordinance would have the impermissible effect of chilling speech or protected activity. Here, since there is only a judicial decree rather than an act of elected officials, the rationale for this higher standard is absent. No judicial deference to the political branches is necessary for the obvious reason that only the judiciary was involved in issuing the decree. This Court need only find that the judges below have issued or sustained an injunction that would have the effect of chilling some speech or protected activity. In any event, in the view of the *Amici*, the injunction is substantially overbroad, as the hypothetical examples from other controversial areas of speech (union picketers, consumer boycotters, and animal rights activists) offered above illustrates.

Maryland v. Joseph H. Munson Co., 467 U.S. 947, 956-57 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).[8]

The vice of overbreadth is that the tool used to achieve a legitimate goal is inept, like using an elephant gun to shoot a mouse. Here the problem is that the most traditional public forum imaginable in our culture was closed down by judicial decree. The parks, sidewalks, and streets have "from time immemorial" been held open in trust for the people as public fora for use through assembly, debate, and the discussion of public questions.[9] *Perry Education Assn., v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983), *citing Hague v. CIO*, 307 U.S. 496, 515 (1939); *see also Frisby v. Schultz*, 487 U.S. 474, 479-81 (1988). In this

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[8] There is no serious issue of standing here. Petitioners were named defendants in the injunction and those allegedly acting "in concert" with them testified to the effect that the injunction had a chilling effect upon them. Even if there were no allegation of such direct injury, the overbreadth claim brought by the petitioners confers standing upon them to represent third parties whose free speech was chilled by the injunction.

[9] In the past decade the public square has been shrinking. For example, this Court has diminished the ability of religious organization to roam freely through a public park while a state fair is being conducted. *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). It has told us that the sidewalks in front of post offices are no longer as open a forum as we had thought even before the days of "Boss Hague." *United States v. Kokinda*, 497 U.S. 720 (1990). Most recently the Court has told us that we are not as free to sell our sacred literature in an airport as the purveyors of *Hustler* and *Playboy* are to sell their wares. *International Society for Krishna Consciousness v. Lee*, 112 S.Ct. 2701 (1992). With distressing precedents on "public fora" such as these, *Amici* trust that this Court will not further erode one of the last remaining places that afford the people an opportunity to communicate their views.

forum, the right of the state to limit expressive activity is sharply circumscribed. *Perry*, 460 U.S. at 45. Content-based restrictions on expression must be shown by the state to be necessary to serve a compelling state interest and narrowly tailored to achieve that end. *Id., citing Carey v. Brown*, 447 U.S. 455, 461 (1980); *see also Police Dept. v. Mosley*, 408 U.S. 92 (1972). Content-neutral time, place, manner restrictions on expression must be narrowly drawn to serve a significant government interest, while leaving open ample alternative channels of communication. *Perry*, 460 U.S. at 45 (citations omitted).

As the Court of Appeals for the Eleventh Circuit viewed the injunction, the restrictions were "no more viewpoint-neutral than one restricting the speech of 'the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf." *Cheffer v. McGregor*, 6 F.3d 705, 711 (11th Cir. 1993). Whether, as the colloquy cited above suggests, the *intent* of the injunction was to aim at one viewpoint in a public controversy,[10] the practical *effect* of the injunction was to facilitate the arrest of pro-life speakers based on dubious

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[10] In support of the claim that the amended permanent injunction was drawn to encompass only pro-life speech by enjoining Operation Rescue and other pro-life organizations, specific named pro-life individuals, "and all persons acting in concert or participation with them or on their behalf . . . ," *see* Pet. App. B-6. In formulating the injunction, it appears to have been the expressed intent of the Florida Circuit Court [trial court] to address only the speech of pro-life individuals and to restrict only pro-life protest activity. Pet. App. B-6 through B-9.

"in concert" grounds, while leaving pro-choice demonstrators unhindered by any of the injunction's restrictions. *Id.*

Some would find much to criticize in the style and tactics of some forms of abortion protest. But the record with respect to the petitioners before the Court in this case discloses nothing but protected expressive activity. Stipulated Facts, ¶ 5 (Pet. App. I at 65). And *Amici* are clear about our duty to protect even speech with which some may disagree, so that the speech we cherish will not be unprotected because of our cowardice in time of crisis. As Edmund Burke put it, "The only thing necessary for the triumph of evil is for good men to do nothing." [*Letter to William Smith* (January 9, 1795)]. Or as Pastor Martin Niemoeller said of his own complicity in the deeds of the Third Reich: "When they came for the communists, I didn't do anything because I wasn't a communist. When they came for the Jews, I didn't do anything because I wasn't a Jew. When they came for the trade unionists, I didn't do anything because I wasn't a trade unionist. When they came for the Catholics, I didn't do anything because I wasn't a Catholic. When they came for me, there was no one left."

While some take offense at the petitioners' statements, this Court has repeatedly taught that " '(t)he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.' " *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (scurrilous caricatures) *quoting FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (vulgar words). Similarly, the Court wrote

in *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning): " 'If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' " *id.* at 319, quoting *Texas v. Johnson*, 491 U.S. 397 (1989) (same); *see also Cohen v. California*, 403 U.S. 15 (1971) (vulgar repudiations of the draft); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (virulent ethnic and religious epithets).

II. The state court injunction exceeded the normal remedial powers of a court.

Amici acknowledge that the case under review arises from a State court, not a federal court, and that this Court has a supervisory role over federal courts that it does not have over State courts. Nonetheless, as the petition amply illustrates, the apparent conflict that led the Court to grant review in this case involves the same parties making the same claims and represented by the same attorneys. If there ever were a case where the rules governing both courts should be the same, it is this one. We urge that the Court vacate the injunction here in light of the Court's teaching on injunctive relief in public school desegregation cases.

In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), Chief Justice Burger wrote for a unanimous court: "As with any equity case, the nature of the violation determines the scope of the remedy." *Id.*, 402 U.S. at 16. The Court's objective in *Swann* was to eliminate state imposed segregation of the public schools, ensuring equal

protection as guaranteed to all citizens under the Constitution. *Swann*, 402 U.S. at 15. The remedial measures necessary to attain this goal, however, were subject to general limitations on the exercise of judicial discretion. *Id.* Thus even the laudable end of correcting a constitutional wrong does not justify judicial means that exceed the proper scope of judicial intervention.

The Court noted further:

> a school segregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of constitutional rights. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. In seeking to define even in broad and general terms how far this remedial power extends, it is important to remember that judicial power may be exercised only on the basis of a constitutional violation.

Swann, 402 U.S. at 15-16.

In *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974) this Court vacated an injunction that went much further than the facts in *Swann*. Despite a finding of *de jure* segregation of the public schools of Detroit in violation of the Fourteenth Amendment, the Court noted that the scope of the injunction exceeded the violation itself by enjoining adjacent school districts that had not themselves engaged in any unlawful activity.

Three years after *Milliken I*, the Court heard the same case at a later phase, and approved the remedy of court-ordered payment of State funds for remedial educational programs for the children attending the Detroit schools. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977). This

remedy is more closely analogous to damages than to an intrusive injunction, for the children were helped in *Milliken II* with the standard means of making an injured person whole, by paying money to repair the injury. The critical difference between the cases is that the defendant, Governor Milliken, in his official capacity represented a community – the State of Michigan – which had intentionally violated the guarantee of the Fourteenth Amendment, while the elected officials in the school districts surrounding Detroit had not engaged in any conduct violative of the Constitution.

In this case, the petitioners have not engaged in unlawful activity, but were attempting to exercise their constitutional right to assemble peaceably and to speak their minds freely about one of the most vexing social issues of the day. Stipulated Facts, ¶ 5. In this respect, they are much closer to the suburban school districts surrounding Detroit than to the official State actors in Lansing who intentionally set up a *de jure* segregated school district in violation of the Fourteenth Amendment. Hence the restraints governing injunctive power announced in *Swann*, *Milliken I*, and *Milliken II* suggest that the court below erred in issuing and in affirming the injunction. For example, *Swann* mandates judicial restraint even with injunctions that remedy clear constitutional violations; this teaching suggests that courts must be still more careful in issuing injunctions which target constitutionally protected expressive activity.

Amici do not rely only on these general principles governing the equitable power of courts to issue injunctions. For this Court has directly addressed the more specific power to enjoin *speech*. *See, e.g., New York Times*

Co. v. United States, 403 U.S. 713 (1971); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *Near v. Minnesota*, 283 U.S. 697 (1931).[11] In all of these cases, the Court taught that there is a very heavy presumption against such injunctions, otherwise known as the vice of prior restraint, against which the Free Press Clause is directly aimed.

The Supreme Court of Florida dismissed the problem of prior restraint presented here by characterizing the injunction as "content-neutral," *citing Northeast Women's Center, Inc. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991). Pet. App. A-19, A-20; *and see* A-14, A-15. Once this pretense of neutrality is rejected, as *Amici* think it must be, *see* Part I A above, the heavy burden against prior restraint of speech and expressive activity comes into play.

Standard principles governing the remedial power of courts thus yield the conclusion that the injunction issued here by the Florida Circuit Court and affirmed by the Supreme Court of Florida should be vacated because it invades constitutionally protected activity. The courts below drew lines more broadly than the First Amendment permits or the right to privacy requires.[12]

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[11] *Amici* note that the same standard governing federal injunctive power in *New York Times* also governed the state court decisions in *Nebraska Press Assn.* and in *Near*.

[12] Under *Roe v. Wade*, 410 U.S. 113 (1973), a woman has a right to be free from criminal prosecution for procuring an abortion under most circumstances. Under *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), she has a right to be free from regulation of the abortion decision which imposes an "undue burden" upon her. But under *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 764 (1993), "the right to abortion has been described in our opinions as one element of a more general right of privacy, or of Fourteenth Amendment liberty, and the other elements of those more general rights are obviously not protected against private infringement." An individual's reasonable expectation of privacy while traveling over public roads is much lower than the same individual's reasonable expectation of privacy in one's residence. *See Katz v. United States*, 389 U.S. 347 (1967). The right of privacy does not bestow on a pregnant woman a 300 foot wide buffer against all pro-life messages, wherever she may be. For "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Casey, supra*, 112 S.Ct. at 2821 (Opinion of O'Connor, J., Kennedy, J., and Souter, J.).

CONCLUSION

For these reasons the decision of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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Statement of Interest

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the protection of religious speech and exercise.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence, (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-

negotiable prohibition attached to this, our First Freedom is "Congress shall make **no** law. . . . "

Americans United for Life (AUL) is a national, non-sectarian, public interest law firm and educational organization based in Chicago, Illinois. AUL's mission is to restore respect in law and public policy for all human life from conception to natural death. AUL joins this *amicus curiae* brief because of its concern that the First Amendment rights of Petitioners and others who lawfully and peacefully oppose abortion are threatened by the vague and overbroad injunctive relief upheld by the Florida Supreme Court in this case.

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. It defends the right of Catholics – lay and clergy alike – to participate in American life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League recognizes the importance of defending the religious freedom rights of all Americans, and is thus prepared to defend those rights in court.

Family Research Council conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

The National Association of Evangelicals is a non-profit association of evangelical Christian denominations,

churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The Southern Baptist Convention ("SBC") is the nation's largest Protestant denomination, with over 15.4 million members in over 38,200 autonomous local churches. The Christian Life Commission ("CLC") is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. The CLC seeks to advocate positions consistent with Southern Baptist convictions by filing briefs as *amicus curiae* in litigation important to these values, such as this case.